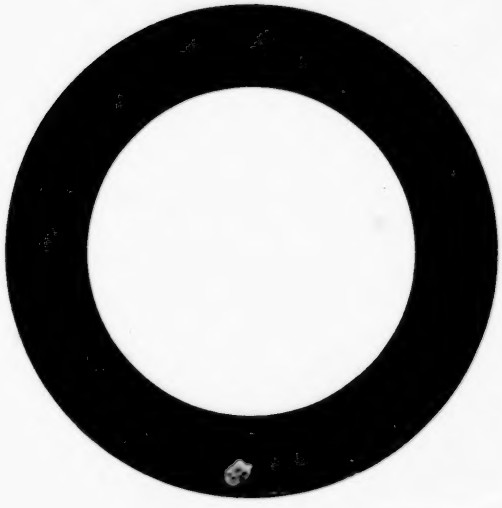

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Letter dated 8 February 2005 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council

Acting upon instructions from my Government, I have the honour to convey to your kind attention the response of the Government of the Sudan (see annex) to the report of the International Commission of Inquiry on Darfur established pursuant to Security Council resolution 1564 (2004).

I would highly appreciate it if this letter and its annex could be circulated as a document of the Security Council.

(*Signed*) Elfatih **Erwa**
Permanent Representative

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Annex to the letter dated 8 February 2005 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council

Response to the report of the International Commission of Inquiry on Darfur to the Secretary-General

Introduction

1. The Government of the Sudan would like to express its sincere thanks to the international community, the United Nations and members of the Security Council for their interest and efforts in support of the Government's endeavours to resolve the conflict in Darfur and to consolidate peace and stability in the Sudan. The Government also recognizes the efforts of the International Commission of Inquiry on Darfur.

2. In responding to the report of the International Commission, it is important to briefly outline the course of events in Darfur since 2003. An armed rebellion started in Sudan's western region of Darfur in the course of 2003. Two armed movements, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) commenced attacks on civilians and military personnel in the three States of Darfur, Northern, Southern and Western Darfur. They attacked towns as well as government and civilian installations and property across the region. Considerable numbers of civilians and members of the Government security forces were killed in these attacks. The Sudanese army has sustained well over 3,000 casualties.

3. In addition to attacks on civilians and military forces in Darfur, rebel forces murdered 685 policemen and injured 500 others in their attacks. More than 80 police stations were destroyed. The police presence in much of rural Darfur ceased to exist. The resultant breakdown in law and order led to a dramatic increase in serious pre-existing patterns of criminal violence and inter-tribal violence which spiralled out of control — a lot of which has been obscured by the continuing rebel insurgency, which has itself displayed both criminal and tribal dimensions. These unprecedented and often interlocking patterns of violence have led to large-scale violations of human rights. The Government stresses that under no circumstances has it, explicitly or implicitly, planned or encouraged actions in violation of human rights or international humanitarian law in Darfur.

4. The level of violence in Darfur has been of deep concern to the Government of the Sudan and the international community. In reflection of this the International Commission of Inquiry on Darfur was established pursuant to Security Council resolution 1564 (2004), adopted on 18 September 2004. A five-member body, chaired by Antonio Cassese, from Italy, was appointed by the Secretary-General in October 2004, and commenced its work on 25 October 2004. It was requested to report back to the Secretary-General within three months, which is to say by 25 January 2005.

5. In paragraph 2 of its report (see S/2005/60), the Commission set out the tasks it had been set by the Security Council in resolution 1564 (2004), namely to investigate reports of violations of international humanitarian law and human rights by all parties, to determine also whether or not acts of genocide have occurred, and

to identify the perpetrators of such violations, with a view to ensuring that those responsible are held accountable.

6. In paragraph 3, the Commission stated that it was to act as a fact-finding body, beginning with an assessment of information contained in the various reports made by other bodies including Governments, United Nations bodies, organs of other intergovernmental organizations and non-governmental organizations. The Commission also provides a list of media and press articles.

7. While the Government of the Sudan welcomes any objective attempts to examine the nature of human rights abuses in Darfur, it was disappointed with a number of sections within the Commission's report, which led to several unacceptable conclusions. The report did not adequately or systematically address the nature and pattern of human rights abuses in Darfur since 2003. The Government believes that the Commission's methodology was fundamentally flawed, particularly in relation to its definition of the "Janjaweed" phenomenon in Darfur. Instead the Commission's report presented a regrettably all too superficial view of what is widely recognized as being a particularly complex crisis. The Government of the Sudan is cognizant of the fact that the Commission was clearly under enormous time constraints and operated under budgetary and staffing constraints which undermined its ability to adequately address or investigate all the categories of human rights abuses it sought to review.

8. The Government of the Sudan expresses particular concern with regard to the judicial standard of evidence the Commission chose to pursue. The Commission has itself conceded that it has made serious accusations and reached conclusions and drawn up lists of alleged perpetrators of serious crimes **not** by proof of facts beyond a reasonable doubt or by the presentation of a prima facie case. That this is an affront to natural justice is self-evident. That such a questionable judicial standard was applied to the examination of the serious crimes the Commission was mandated to review is all the more questionable. The Government finds it legally perverse, for example, to hold the Government of the Sudan accountable for virtually every attack on civilians in Darfur.

9. The Government of the Sudan finds it particularly legally perverse that, as outlined in paragraph 126, the Commission finds that even in instances where there is no evidence whatsoever for Government involvement in alleged attacks by unidentified armed groups, even given the Commission's questionable low evidentiary threshold, "Government officials may incur criminal responsibility". That this is a perverse finding contrary to natural justice is self-evident.

10. The Government of the Sudan does note, however, with regard to the Commission's investigation of allegations of genocide in Darfur that, even with the particularly low threshold of judicial evidence the Commission set itself, it found that genocide had not taken place. The Government of the Sudan notes that while the time frame within which the Commission had to work was adequate for the Commission to make a finding with regard to the central issue of whether or not acts of genocide have occurred in Darfur, it was clearly a time frame within which it was not possible to adequately address or investigate the other categories of human rights abuses cited by the Commission.

The Commission's difficulties in addressing the mandate

11. In paragraphs 18 and 19, the Commission admitted the logistical and legal constraints and difficulties it faced in addressing its mandate. The Commission conceded that its tasks were complex and that it had to operate under serious time constraints. It also correctly pointed out the scale and magnitude of incidents relating to the conflict in Darfur and stated that to adequately address its mandate it would have needed the assistance of a great number of investigators, lawyers, military analysts and forensic experts. In the event, in addition to the five-member Commission itself, which visited Darfur once, the Commission was assisted by a 13-person team. These were military advisers, forensic experts and some lawyers, and were engaged for 12 weeks. This team was then split into three separate teams sent to the three States of Darfur, an area the size of France. It spent 21 days in Darfur. It is clear that this staffing level was not sufficient to adequately investigate a number of the alleged crimes it listed. The logistical problems together with working in a war zone further complicated the Commission's task. For example, within most developed countries an adequate investigation of even one case of murder would see the engagement of dozens of police officers and support staff within a controlled working environment and such an investigation could take several months — and even then may not result in an arrest or charges being brought.

12. The Government believes that the Commission was simply unable to adequately address or investigate all the categories of human rights abuses and violations of international humanitarian law it was tasked to examine. It certainly did not allocate equal or reasonable time to adequately investigate the considerable body of human rights abuses and violations of international humanitarian law committed by rebel movements in Darfur. The Commission, for example, failed even to investigate or document a number of particularly well-documented cases of rebel abuses, involving the killing of civilians, rape and, in one case, the burning alive of wounded soldiers in Baram hospital. These were either not mentioned or not adequately addressed in the report.

13. Given the time constraints and other pressures, it would have been inevitable that several crucial conceptual corners were cut in the investigations conducted by the Commission. It is the Government's view that this was reflected in a number of its conclusions. The Commission's inability to adequately address or investigate the complex socio-economic, tribal and criminal dimensions of the Darfur crisis was particularly reflected in its inadequate definition of what constituted the "Janjaweed". The Government will return to this issue later in this response.

Flaws in methodology

14. In addition to simply being unable to adequately address several key areas relevant to its mandate, critical areas of the Commission's methodology were also questionable.

15. **Questionable sources**. One immediate flaw apparent in the methodology of the report was that it at no point addresses the fact that there is an ongoing conflict in Darfur, and that all war — and especially civil war — brings with it disinformation, misinformation and propaganda. The conflict in Darfur has been no exception. There has been a pattern of attempts at disinformation, misinformation and propaganda in the course of the conflict in Darfur. The Commission neither

recognized nor addressed this issue conceptually, methodologically or practically in the report.

16. Given that much of its work was to involve assessing materials, reports and other claims presented or made to it by sources often hostile to the Government of the Sudan, the Commission should have provided details of its criteria for assessing such materials. Indeed, not only did it not address the need to offset at least some of the materials it would be assessing, but it listed among "public reports on Darfur consulted by the Commission", a number of publications from international non-governmental organizations whose previous work and reporting on, and assertions about, the Sudan have been particularly questionable and inaccurate in their assertions. Those non-governmental organizations, and in some cases the authors of specific publications, are questionable because of a clear record of political opposition to the Government of the Sudan — a bias which has been reflected in the accuracy and balance of their material. Similar concerns could be raised about a number of other non-governmental organizations and personnel of such organizations with whom the Commission and its investigators have interacted. The report did not indicate any reservations about these sorts of materials or claims with which it was presented.

17. The existence of propaganda and deliberate attempts by the rebel movements and some non-governmental organizations to deceive with regard to alleged Government abuses of human rights in Darfur is well documented. In September 2004, for example, the German daily newspaper *Die Welt* published allegations that the Sudanese Government had been party to the use of chemical weapons in Darfur.[1] Similar allegations surfaced at the same time in Norwegian media. The story was soon discounted, by, among others, the American, German and British Governments. The British Government stated, for example, that it had "seen no credible evidence" to support the allegation.[2] In the meantime the claims, in common with many similarly inaccurate allegations about the Sudan and events in Darfur, had been republished by major news agencies and by the media worldwide.[3] The international media reported that German Government sources blamed the fabrication on Sudanese exile groups. The Norwegian variant on the story was directly sourced back to the Sudan Liberation Army and an international non-governmental organization.[4]

18. The Government of the Sudan strongly believes that the rebel movements have been party to continuing systematic and premeditated attempts to produce and place atrocity propaganda with regard to the Darfur crisis. The attempt by SLA to place false claims of the use of chemical weapons in Darfur within the international community points to a clear intent on the part of the rebels to deceive by way of false claims — claims that were at least as serious as crimes against humanity. It follows therefore that there is a strong possibility, if not an inevitability, that many

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[1] "Syrien testet chemische Waffen an Sudanern", *Die Welt* (Berlin), 14 September 2004.

[2] House of Lords *Hansard*, written parliamentary answer, 16 November 2004, column WA 130.

[3] See, for example, restating of claims, "Syria tested chemical arms on civilians in Darfur region: press", Agence France Presse, 14 September 2004, and the discounting of the allegations: "Germany questions report Syria tested chemical weapons", Deutsche Press Agentur, 16 September 2004, and "US doubts report on Syrian chemical weapons testing in Darfur", Agence France Presse, 15 September 2004.

[4] See, for example, "Sudan chemical weapons allegations from Norway, Germany", afrol News, 15 September 2004, available at <http://www.afrol.com/articles/13956>.

of the accounts the Commission would have received from rebel movements and from civilians within rebel-controlled areas of Darfur with regard to alleged Government involvement in human rights abuses may have been coloured or compromised by pressure to do so from the rebel movements. It is a matter of record that the rebels have murdered members of the Zaghawa, Fur and Masalit tribes for opposing them within their own communities. Much of what the Commission refers to as a "body of evidence", including on-site investigations within rebel areas, would have originated from potentially questionable sources living within areas under rebel control.

19. It is also worth noting, especially with regard to the attention paid by the Commission to the issue of rape in Darfur, that there have also been clear attempts to deceive the international community concerning allegations of rape. Criminal charges were brought in a Darfur court with regard to attempts to fabricate evidence of rape by way of staged video footage.

20. **Judicial standards**. The Government of the Sudan finds that the Commission employed an unacceptable standard of evidence in reaching most of its conclusions. In paragraph 15, the Commission defined the judicial standard it applied to its investigation:

> In view of the limitations inherent in its powers, the Commission decided that it could not comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt), or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case). It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.

21. That is to say it chose to make findings based on material from which it might said that a person — or entity — may reasonably be suspected of having been involved in the commission of a crime. That this is an unsatisfactory standard is clear, especially given the serious nature of the alleged crimes.

22. At the same time, natural justice would argue that it should have provided the Government with a similar evidential standard. This, however, was not the case as the Commission demanded that the Government and affected citizens of Darfur produce "concrete information or evidence" (para. 414) to support their claims.

23. It is worthwhile reiterating the judicial standard the Commission chose to follow. It has made accusations and reached conclusions and drawn up lists of alleged perpetrators of serious crimes **not** by proof of facts beyond a reasonable doubt or by the presentation of a prima facie case. That this is an affront to natural justice is self-evident. That such a questionable judicial standard was applied to the examination of the serious crimes the Commission was mandated to examine is all the more questionable.

24. We do note, however, with regard to the Commission's investigation of allegations of genocide in Darfur that it found that genocide had not taken place even with the particularly low threshold of judicial evidence pursued by the Commission.

25. **Unacceptable variations in the standards of evidence**. The Government of the Sudan believes that the Commission was remarkably selective in its treatment of relevant documents submitted to it by various government bodies. The Commission's report, for example, did not reflect a great body of evidence — much of it supported by eyewitnesses — relating to systematic human rights abuses throughout Darfur, and neighbouring areas, by the rebel movements. The Commission's report also ignored a body of documents directly pertinent to the Commission's terms of reference including, inter alia, reports of criminal investigations, prosecution, court decisions and convictions relating to the prosecution of human rights abuses in Darfur.

26. The Commission's setting of one standard of evidence for itself with regard to alleged Government involvement in human rights abuse and another for allegations of rebel abuses was manifested throughout the Commission's report. That is to say that despite the low threshold of standards of judicial evidence it set itself, this threshold has not been applied equally to its investigations of similar alleged incidents in Darfur. In paragraph 286, for example, when reviewing reports of civilians killed in a rebel attack on Kulbus town, in Western Darfur, on 25 and 26 December 2003, in the course of which a number of civilians were killed, the Commission states that it would need further investigation to determine whether civilians were caught in crossfire, or whether they were attacked in an indiscriminate or disproportionate manner, or killed wilfully. There is no indication that the Commission set such a standard in assessing whether civilians were killed in crossfire during alleged government operations against rebel camps within villages. Similarly, in reviewing the rebel attack on Kulbus, the Commission stated: "Arguably, the town of Kulbus was a military target, evidenced by the military camp there." Similar reservations, the declaration, for example, that a village or area might have been regarded as a military target given the presence of combatants, were not voiced with regard to alleged government attacks on villages or areas — alleged attacks described in the Commission's report. For example, in paragraphs 250-251, in a case study of an alleged attack on a village, it is alleged that a combined force of government soldiers and Janjaweed attacked the village of Anka in Northern Darfur on or about 17 or 18 February 2004. The report cites witnesses as stating that approximately 20 members of the SLA rebel movement were present in the village. The report alleges that 15 civilians were killed, and 8 others injured, in the Anka incident. This attack was recorded as an example of an "indiscriminate" attack by government armed forces and the Janjaweed on civilians and civilian objects in villages. The inconsistency in approach by the Commission is self-evident. A military presence in Kulbus is deemed, "arguably", to make Kulbus a "military target". An armed SLA presence in Anka, however, was not seen "arguably" or otherwise as a "military target". Similarly, the Commission questions whether or not the civilians killed in the rebel attack on Kulbus were killed in crossfire — something which would need further investigation — while there is no such reservation or query with regard to the alleged civilian casualties in the Anka village incident.

27. Similarly, in a further case study of an allegedly "indiscriminate" government attack on civilians or civilian objects (para. 253), said to have been on the village of Adwa in Southern Darfur, on 23 November 2004, the Commission states that government forces attacked a rebel base near Adwa. It alleges that civilians were killed and injured in this attack. Even in the Commission's account of events there is

confusion, with reports of civilians being targeted and of armed forces personnel instructing some civilians that they were not targets. The Commission asserts that between 20 and 30 civilians were killed. This case study is instructive in that it demonstrates that it was unable to even ascertain the number of people said to have been killed. The Commission asserts that more than 100 people were injured while stating that an international organization on searching the village was able to find only "several" injured civilians. In the Adwa incident, the Commission presents yet another example of an alleged government attack on a rebel base within a civilian area and close to a village. It does not state how close the rebel base was to the village, nor does it examine or outline the course of the alleged action against the rebel forces, and subsequent rebel disengagement from the action within the civilian community and how this may have resulted in civilian casualties. The Commission did not address the issue of whether or not the rebel base in the Adwa area constituted a military target.

28. The evidentiary double standard was particularly evident in the Commission's demand for "concrete information or evidence" (para. 414) with regard to the rebel movement's use of child soldiers.

29. Such inconsistency in the standards of evidence adopted by the Commission fundamentally flaw the case presented by the Commission and therefore the conclusions it has drawn and presented to the Secretary-General.

30. There have been a number of military operations which involved assaults on rebel positions within civilian areas in Darfur. That the rebels have sheltered in and launched attacks from villages in Darfur is a matter of record. The Commission has itself documented such activity (paras. 251-252). A pattern of such activity has been documented by other sources.

31. A closely related issue, and one of the issues frequently raised with regard to human rights issues, and unfairly and inaccurately reviewed in the Commission's report, has been the Government's use of air power in its war against insurgents in Darfur with the focus upon any resultant civilian casualties or displacement of civilians. That a government reserves the right to use air power in war is obvious. Air power has been used in every recent conflict — not least during the Iraq war and subsequent occupation. That civilians are often killed, injured or displaced during even the most clinical bombing attacks against insurgents has also been amply demonstrated in Iraq, Afghanistan, Yugoslavia and elsewhere. Where mistakes have been made in the course of military operations in Darfur the Government has admitted them and offered compensation. The Commission clearly documented this in paragraphs 281 and 429.

32. That the rebel movements have wittingly or unwittingly drawn air attacks upon the civilian population in Darfur is a matter of record. The Government has on several occasions pointed out that rebels would often have camps next to villages and that on many occasions they have attacked the army from within villages.[5]

33. The rebels have themselves admitted their presence among civilians in villages. SLA, for example, admitted that 25 rebels had been killed in an air force attack on a village 25 miles south of Al-Fasher in Northern Darfur.[6] A British

[5] "Sudan: Darfur rebels use human shields", Reuters, 19 October 2004.

[6] See "Sudan rebels say air strike kills 25 fighters", Reuters, 24 November 2004, and "Sudan rebels retreat under Government air attack", Reuters, 24 November 2004.

television crew has also independently reported on the rebel presence in villages, in, for example, Thabit in December 2004: "This village is full of rebel soldiers from the Sudan Liberation Army. Eight were wounded in the bombing of Thabit. What happened here was an act of war. But it was an act of war provoked by the rebels to make the government look bad ahead of this week's peace talks."[7] That is to say, the rebels chose to put civilians at risk for short-term political advantage.

34. International human rights organizations have pointed to an apparent rebel indifference to civilian casualties. Amnesty International, for example, has noted: "Of course it's the government's duty to distinguish the SLA from civilians, but the SLA doesn't help in making that distinction."[8] In a report to the United Nations Commission on Human Rights, United Nations officials noted that: "There are some claims that [the rebels] operate from or near civilian areas and rely on towns and villages composed of certain ethnicities for support and supplies. This has endangered civilians in many areas and appears to feed into certain groups being considered as hostile to the Government."[9]

35. This pattern of culpable behaviour on the part of the rebel movements was not reflected in the Commission's report.

36. On a related issue, the Government of the Sudan has claimed, claims that were subsequently independently confirmed, that rebels have been using displaced persons camps from which to stage attacks on relief convoys and government officials, actions which clearly endanger civilians by provoking a possible military response by government forces. In October 2004, as but one example, an attack on a relief convoy 20 kilometres south-west of Al-Fasher was staged from the Tawila displaced camp.[10] Security forces had also discovered an arms cache near the Zam Zam displaced camp near Al-Fasher. Late in November 2004, the World Food Programme reported that, on 21 November 2004, rebels attacked a police station on the edge of the Kalma internally displaced persons camp. This resulted in the death of several policemen. WFP confirmed that "ominously, the attack appeared to have been launched from inside Kalma camp".[11]

37. This pattern of culpable behaviour on the part of the rebel movements was also not reflected in the Commission's report.

38. In a general note, it must be pointed out that the apparent rebel policy of taking refuge within, and operating from, villages presumably among ethnic communities from which they are drawn or which reflect the ethnic composition of their formations, may explain why many of the spontaneous ad hoc revenge or recovery attacks by armed nomadic groups responding to attacks on their communities have focused on, for example, Zaghawa, Fur and Masalit villages. In pursuing rebels who have attacked their tribes and/or stolen their livestock, nomadic

[7] News at 7, Channel Four (London), 16 December 2004.

[8] Benedicte Goderiaux of Amnesty International, quoted in "Power struggle: Darfur's Janjaweed militia aren't the only ones sowing chaos and death. Meet the two rebel factions threatening yet another civil war", *Time*, 31 October 2004.

[9] Situation of human rights in the Darfur region of the Sudan (E/CN.4/2005/3), Geneva, 7 May 2004.

[10] "Rebels from displaced camp attack relief convoy", *Sudan Vision* (Khartoum), 2 October 2004.

[11] "Renewed fighting shuts down WFP operations in North Darfur", statement by World Food Programme, Nairobi, 25 November 2004.

communities will tend to seek retribution from those communities either identified with the rebels or from which they are perceived to have been drawn.

39. This crucial fact, which goes someway to explaining much of the inter-communal violence that has occurred in Darfur, was not reflected in the Commission's report.

40. **Questionable analysis**. The Commission's report contains within it numerous examples of questionable analysis. The Government points to just three examples.

41. In paragraph 62 and elsewhere, the Commission appears to accept that the armed conflict that started in 2003 was rooted in socio-economic and political marginalization. This analysis, however, is a controversial one, contradicted in large part by a clear record of socio-economic development within the Sudan since 1989. It is a view clearly contradicted by the Sudan's most prominent human rights activist, Ghazi Suleiman, who had stated that the conflict in Darfur is essentially a war being fought out between the Government and the Popular Congress party. He has stated, for example, "The conflict in Darfur has nothing to do with marginalization or the inequitable distribution of wealth. Inherently it is a struggle between the two factions of the Sudanese Islamist movement, the (opposition) Popular Congress party and the ruling National Congress (party)."[12]

42. On a similar note, the Commission appears to have accepted at face value that the main reason the rebels have attacked police stations has been to capture weapons. The rebels have attacked police stations for many reasons: they are a soft target; attacking policemen undermines law and order within Darfur; the attacks seek to provoke the Government; and more recently the attacks seek to destabilize the security of internally displaced persons camps in Darfur. The rebel movement is well-equipped with a large variety of weapons. They are in many instances better armed than Government armed forces. To accept rebel claims that these attacks are to obtain weapons is simplistic. It is also an unacceptable attempt to mitigate the murder of over 600 policemen.

43. In paragraph 267, the Commission claims that by commencing military operations at dawn Government armed forces were somehow seeking to spread terror among civilians so as to compel them to flee the villages. It is a universal operational procedure for military operations to be initiated before dawn or at dusk. The Commission stated that it had military consultants among its support staff. The Government of the Sudan is surprised that they were unable to provide elementary guidance on this point. This is not to "spread terror" to force civilians to flee villages: military operations that commence at dawn or dusk are designed to utilize the cover of darkness for manoeuvre, movement and surprise.

The report's central flaw: the Commission's definition of Janjaweed

44. The Commission failed to the single most important task it should have set itself — an accurate and adequate definition of the term "Janjaweed". That this would be a difficult and controversial task was obvious. The Reuters correspondent in the Sudan, for example, has noted: "In Darfur, Janjaweed is a word that means

[12] "Sudan Islamists use Darfur as battleground", Reuters, 22 September 2004.

everything and nothing."[13] The *Los Angeles Times* similarly cautioned that the word "janjaweed" means different things to different people.[14]

45. It is clear that a large number of villages have been destroyed or partially destroyed in the course of the conflict in Darfur. The Government notes that there has been a clearly documented pattern of rebels sheltering within civilian areas and launching attacks on civilian and government targets from within civilian areas. These areas have been caught up in the conflict.

46. The irretrievable flaw in the Commission's report was its inability or unwillingness to differentiate between operations within civilian areas, including military operations against rebel positions within villages, carried out by regular and irregular Government forces — for which the Government accepts full responsibility — and a pattern of attacks within civilian areas and villages carried out by groups unconnected in any way to the Government of the Sudan. This intrinsic flaw is in large part the result of the Commission's inability to adequately or accurately analyse or define the term Janjaweed.

47. In paragraph 99, for example, the Commission defines "Janjaweed" as "a generic term to describe Arab militia acting under the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions. For this reason, the Commission has chosen to use the term Janjaweed throughout this report, and also because it reflects the language used by the Security Council in the various resolutions concerning Darfur and, most of all, because it is constantly referred to by victims."

48. In paragraphs 103-104, the Commission further states: "Victims of attacks consistently refer to their attackers as Janjaweed ... When asked to provide further details, victims report that the Janjaweed attackers are from Arab tribes and, in most instances, attacked on horseback or on camels and were armed with automatic weapons of various types." The Commission notes as "precisions" that the attackers were Arab and armed with modern weapons central to defining "Janjaweed". The Commission said outside of these "precisions" it is "probably impossible to define the 'Janjaweed'". The imprecision of the definition is glaring. The Commission additionally states that "where victims describe their attackers as Janjaweed, these persons might be from a tribal Arab militia, from the Popular Defence Forces or from some other entity ...".

49. The Commission's inability or unwillingness to see the Janjaweed as anything other than an Arab militia under the Government's control is in any case additionally contradicted by the fact that in the first ever interviews of a "Janjaweed" leader, that leader was revealed to have been a member of the African Berti tribe; his "Janjaweed" band was made up of both African and Arab tribesmen.[15]

50. Significantly, the Commission states, in paragraph 246: "One of the cases reported to the Commission explicitly referred to the involvement in the attacks of PDF, together with regular Government armed forces and Janjaweed." It further notes: "In most cases ... victims did not differentiate between Government armed

[13] Nima el-Baghir, "What's in a Name?", *Focus on Africa*, BBC, October-December 2004, London.
[14] "Squabble over words obscures Sudan violence", *Los Angeles Times*, 6 November 2004.
[15] See, for example, "We fight on, says the demon of Darfur", *Sunday Times* (London), 25 July 2004, and "Misreading the truth in Sudan", *New York Times*, 9 August 2004.

forces on the one hand and militias, and other groups acting, or perceived to be acting, with the support of Government authorities, on the other. When asked whether the perpetrators were Government armed forces or Janjaweed, one victim stated that 'for us, these are one and the same'." This is significant for three reasons. Firstly, it is clear that rather than seeking to adequately differentiate between operations by Government forces and attacks by non-Government forces, the Commission would appear to have taken the easy option of saying that these are one and the same thing when it is clear there are reasonable grounds for doubt. It is also noteworthy that the Commission appears to state that there was an explicit reference to the Popular Defence Forces, Government forces and "Janjaweed" on only one occasion.

51. Most significant of all is that, given that the definition of "Janjaweed" at the heart of the Commission's report basically reflects the above view, it is clear that the report reflects a subjective rather than an objective view. The Commission has, by its own admission, consciously reflected subjective perceptions of what constitutes the "Janjaweed" rather than reaching an objective and legally sustainable finding on this controversial issue.

52. The Commission ignored the fact that there have been a considerable number of attacks in Darfur's rural areas by what can best be described as pre-existing or ad hoc tribal militias or armed criminals, and that this pattern of violence not only continued but increased in the post-2003 chaos. The scale of the violence in Darfur, even before the outbreak of rebellion in 2003, had led the Government of the Sudan to introduce special measures, including the declaration of a state of emergency and the establishment by presidential decree of eight special criminal courts to deal with offences such as murder, tribal clashes, armed robbery, arson and the smuggling of weapons. A large number of death sentences were handed down by these courts in attempts to address and curtail this level of violence.

53. The Commission touched on the extent of some of the inter-tribal violence in the late 1980s (note 10), violence which continued into the 1990s. It noted that 57 villages burned down in the Wadi Saleh district alone; this included nearly 400 deaths, the displacement of 42,000 people and the destruction of 12,000 tons of food. Attacks in Jebel Marra were said to have resulted in the burning of 40 villages and 80,000 people being made homeless. All in all 3,500 tribesmen are believed to have died in the violence, and hundreds more were injured. All told some 400 Fur villages, and 700 Arab habitations, were destroyed, displacing a vast number of people. Tens of thousands of head of livestock were lost.[16] The tribal militias in this particular inter-tribal conflict were very well armed and often wore uniform. It is accepted that there was no Government involvement in the conflict except in seeking to bring the violence to an end and in hosting a peace and reconciliation conference which did so.

54. The Commission provides in paragraph 424 a further clear example of the scale and violence of some ad hoc inter-tribal revenge attacks pre-dating the 2003 rebellion. It refers to the case known as *Jagre al-Hadi al-Makbul and others*, involved the two Arab tribes of the Rizeigat and the Ma'aliyah and related to events in April and May 2002. One member of the Rizeigat tribe was killed by two members of the Ma'aliyah tribe. On 18 May 2002, 40 days after the incident, 700 to

[16] See "'Arab belt' versus 'African belt'", in *Short-Cut to Decay: The Case of Sudan*, Nordic Africa Institute, Uppsala, 1983.

800 Rizeigat tribesmen, dressed in military uniforms and heavily armed, attacked a Ma'aliyah community, killing 54, wounding another 24, burning the settlement and looting cattle and household property. The Commission noted that Government forces were not involved.

55. Inadvertently, in citing this well-documented case, the Commission has provided a perfect example both of the sort of inter-tribal attacks involving ad hoc armed tribal groups that have been responsible for many village attacks within Darfur post-2003, and with it the imprecision of the Commission's definition of Janjaweed. The attackers were not Government linked, but nevertheless wore military uniform, and carried automatic weapons. In addition to burning down the village they looted household property. The Commission's working definition of Janjaweed — an armed Arab group — and a Janjaweed attack — an attack on a village leading to the killing, injuring and displacement of civilians and the looting of property — definitions central to the Commission's report, is reflected in this incident.

56. It is clear that this attack would clearly have fitted the description of Janjaweed provided by the Commission in paragraph 121: "The Janjaweed to whom most victims refer in the current conflict are Arab militias that raid the villages of those victims, mounted on horses or camels, and kill, loot, burn and rape." It would have been inaccurate.

57. The Commission's decision to define the Janjaweed as it did, involving its assertion that all Arab militia involved in attacks have been under Government control, fundamentally flaws its report. It ignores clear evidence that there have historically been large-scale attacks on villages by criminal gangs and rival tribes. It also all but ignores the fact that the killing of hundreds of policemen and the destruction of dozens of police stations over the last two years, particularly in the early months of the rebellion, created a security vacuum in that police stations were consolidated to within urban areas in Darfur, weakening a police presence in much of rural Darfur. Additionally, several thousand of the policemen who have subsequently been deployed in Darfur have been deployed on static protection of the many internally displaced persons camps that have come into being in the region, as well as reinforcing a police presence in urban areas. This has led to a dramatic increase in opportunistic violent armed attacks on civilians and villages in rural Darfur. This pattern of criminal violence, often involving attacks on villages, or the scale of such attacks, was not in any way addressed by the Commission.

58. **Ad hoc inter-tribal attacks.** The Commission did not attempt to address patterns of revenge attacks between tribal communities in Darfur, attacks which have often involved ad hoc armed groups involving hundreds and sometimes thousands of tribesmen. That nomadic tribes would take the law into their own hands has been highlighted in international media interviews with tribal leaders: "What is this word militia? What are Janjaweed? These words mean nothing." For years, he says, his people have defended themselves without government help. "Would you entrust those you are responsible for, your women and children, to a government which is so far away?"[17]

59. In documenting the *Jagre al-Hadi al-Makbul and Others* case the Commission provides a clear and unambiguous example of the mobilization of up to 800 armed

[17] Nima el-Baghir, "What's in a name?", *Focus on Africa*, BBC, October-December 2004, London.

tribesmen over the death of one member of the Rizeigat tribe. In paragraph 287, almost in passing, the Commission documented that rebels killed 48 members of the Rizeigat tribe in the Kulbus area. Those killed included women and children. Property and livestock were also stolen. The scale of any retaliation by the Rizeigat for that level of attack can only be speculated upon, and was obviously not followed up by the Commission.

60. Inter-tribal violence of the sort outlined by the Commission in the *Jagre al-Hadi al-Makbul and others* case has continued to occur in Darfur post-2003. One example, among many, is that involving a "Janjaweed" attack by between 800 and 1,000 heavily armed, and in some cases uniformed, members of an armed nomadic group that attacked the Shattaya area in Northern Darfur on 10 February 2004. This attack was focused upon a Fur community and was in revenge for the killing of two members of the nomadic Salamat tribe and one member of the Beni Halba tribe by members of the Fur tribe. Government security forces responded to this inter-tribal attack and engaged the nomadic attackers. Eleven policemen and six members of the Popular Defence Forces were killed in the engagement. Thirteen civilians supporting the police action were also killed. A large number of "Janjaweed" raiders were killed in the action.

61. In another typical engagement, on 4 February 2004, Sudanese armed forces, including elements of the air force, responded to an attack by nomadic tribes on Zaghawa and Masalit communities east and north of Nyala. Seven hundred and fifty head of livestock were recovered by Government forces from these "Janjaweed" raiders. There were a number of casualties on both sides.

62. While the Commission was clearly unable to adequately examine the phenomenon of ad hoc revenge and recovery attacks, Human Rights Watch has provided observers with examples of rebel attacks that would undoubtedly have triggered revenge and livestock recovery attacks by nomadic communities in Darfur. The organization provided details of some SLA attacks on convoys of camels that were being taken across traditional trade routes in Northern Darfur. The attacks had involved significant numbers of livestock. Rebels were said to have stolen more than 4,000 camels in the course of 2003 in attacks on the nomadic Aulad Zeid tribe in Northern Darfur. The attacks had involved the use of automatic rifles, rocket-propelled grenades and machine-guns. The rebels had arrived in Land Cruisers and trucks. Human Rights Watch mentioned that many of the herders were killed defending their animals.[18] One nomadic leader in Southern Darfur had reported the theft from the Ma'aliyah tribe of more than 2,500 camels. In another documented attack, in May 2004, SLA gunmen in Land Cruisers attacked a camel drive north of Atrum, in Northern Darfur. They stole 1,100 camels and abducted 38 civilians — whose whereabouts remain unknown. Those three incidents are only some of the many examples involving the murder of nomadic tribesmen and large-scale theft of livestock. Human Rights Watch has also underlined the seriousness of livestock thefts: "Given the importance of livestock as the primary family asset, looting of cattle and camels can render the owners destitute. This is particularly true for nomads who depend almost entirely on livestock for their income."[19] The pattern of retaliation is predictable. Members of the nomadic tribes affected by either the

[18] *"If We Return, We Will Be Killed": Consolidation of Ethnic Cleansing in Darfur, Sudan*, Human Rights Watch, New York, 2004.

[19] Ibid.

killing of members of their tribe or by theft of livestock will be aware that JEM or SLA rebels involved in attacks on, or thefts from, their tribe, will have been drawn from the "African" Fur, Zaghawa or Masalit tribes. This in turn has fed back into and expanded the cycle of inter-communal violence in Darfur.

63. It is clear that rebels have been taking refuge in villages within the communities from which they are drawn. The Commission has itself provided numerous examples of a rebel presence within various villages in Darfur. Spontaneous revenge and/or livestock recovery attacks by armed nomadic communities have in many instances focused upon neighbouring communities or rival tribes suspected of sheltering or assisting the rebels responsible for killing and theft. Thousands of Arab villagers have been affected by rebel attacks and a vast number of their villages and encampments have been destroyed in rebel attacks. Tens of thousands of head of livestock have been stolen by rebels. One can only speculate as to the scale and intensity of essentially spontaneous ad hoc revenge attacks in response to these and other attacks across a region the size of France. For those nomadic tribes that have been attacked the fact that the rebel attacks may have been carried out in the name of a rebel movement would have been less important than the tribal identity of those involved in the attack. And, crucially, for many of the "African" villages and villagers attacked in these often well-organized and large-scale ad hoc revenge or recovery raids, the attacks would have been by "Janjaweed" — and by the Commission's inexact definition of Janjaweed would also be attributed to Government forces.

64. It is surprising that the Commission did not attempt to address this significant issue of adequately defining what precisely is meant by "Janjaweed" given that it has almost universally been seen as a controversial issue. The inexact nature of some definitions was identified, for example, as a problem by Human Rights Watch. In its publication *Empty Promises? Continuing Abuses in Darfur, Sudan*, the organization clearly stated:

> [I]t is increasingly clear that the term "Janjaweed", while used by victims to describe any armed attacker, is in fact a misnomer, and that there are at least two types of forces encompassed by the description: 1) the government-backed militias used as proxy forces in the government's military campaign; and 2) opportunistic armed elements taking advantage of the total collapse of law and order to settle scores, loot and raid cattle and livestock.[20]

65. This conclusion by Human Rights Watch regarding the term "Janjaweed" was of pivotal importance to the Commission's task of investigating reports of violations of international humanitarian law and human rights by all parties and the perpetrators of such violations. Given that the Commission listed this Human Rights Watch document as having been read (annex IV to the report), we are surprised that this crucial conclusion was not reflected in the Commission's report.

66. It is also noteworthy, given that the inquiry was commissioned by the United Nations, that the United Nations media service has described the "Janjaweed" as being made up of "Sudanese and Chadian horse and camel-riding Arab nomads,

[20] *Empty Promises? Continuing Abuses in Darfur, Sudan*, briefing paper, Human Rights Watch, New York, 11 August 2004.

opportunists and 'criminals'".[21] This United Nations assessment was similarly not reflected in the Commission's definition of Janjaweed.

67. **Range of armed groups active in Darfur**. In a glaring oversight, the variety of armed Arab groups active in Darfur, and separate from Government or Government-controlled forces, was simply not explored by the Commission. A number of the armed Arab groups and communities present in Darfur have been listed by the human rights group Justice Africa. Justice Africa's observations on the "Janjaweed" issue highlight the Commission's unacceptably simplistic definition:

> Who are the Janjawiid? A clear definition of the Janjawiid is a requirement for their disarmament. The term "Janjawiid" has been used to denote Arab militias since the late 1980s, but not always to refer to the same entities. Noting the term "Arab" is ambiguous and fluid in Darfur, we can note the following different armed Arab groups in the region: armed pastoralists. Every community in Darfur is armed. For pastoralist groups, disarmament is out of the question as long as there is no effective law enforcement ... The Rizeigat (Abbala) Janjawiid ... The Beni Halba Fursan ... Other Baggara militia, such as the Janjawiid drawn from the Terjam group that lives in the environs of Nyala. Chadian Arabs, including the Salamat group, which lives on both sides of the Chad-Sudan border. Their numbers are unknown but are rumoured to be substantial ... The Rizeigat (Baggara) Murahalin ... Emergent militias among groups that have not thus far been involved in the conflict ... The Popular Defence Forces ...[22]

68. The Government, along with most objective observers, expected a considerably more demanding attempt to adequately define the term Janjaweed from such a Commission tasked with a crucial investigation with at its heart the need to do so. The Commission's definition clearly inadequately differentiates between military operations which may well have involved Government forces and opportunistic attacks on civilians and villages which may have been carried out by criminal gangs or ad hoc tribal militias pursuing old or new inter-tribal feuds or seeking revenge for recent attacks and theft of livestock. The Commission also ignored the documented existence of armed Arab groups that are essentially Chadian in ethnicity and nationality, made up in part of former combatants within conflicts in that country, which straddle the border and which have had a history of opportunist attacks on Fur communities in Darfur. The Commission documents a number of attacks by "Janjaweed" gangs who are described as wearing khaki uniforms, uniforms associated with Chadian elements. For the Government of the Sudan to be held responsible for attacks and criminality committed by foreign nationals in some cases outside of its jurisdiction is legally perverse.

69. While there has been a pattern of opportunistic criminal activity in Darfur both before and after the 2003 breakdown in law and order, it is difficult to quantify the numbers involved. Estimates range from several hundred to several thousand — the same numbers intermittently given for the numbers of "Janjaweed". The Commission made no attempt to examine, evaluate or quantify the levels of opportunistic criminal violence -- violence separate from inter-tribal revenge or

[21] "The escalating crisis in Darfur", Integrated Regional Information Networks, Office for the Coordination of Humanitarian Affairs, Nairobi, 31 December 2003.

[22] *Sudan Briefing*, Justice Africa, London, July 2004, at http://www.justiceafrica.org/July04.htm>.

livestock recovery raids, and certainly separate from military operations conducted by regular and semi-regular Government forces.

70. It is noteworthy that at paragraph 121, the Commission concedes the existence of independent "militias" taking "advantage of the general climate of chaos and impunity to attack, loot, burn, destroy, rape and kill". Similarly, the Commission acknowledges reports of unidentified "militia incursions" along the border into Chad, often with the apparent aim of raiding cattle and other livestock (para. 196). In a crucial failing it made discernible attempt to follow up or quantify the scale of these activities and incursions.

71. **Janjaweed attacks on the Sudanese police**. The central flaw in the Commission's report, inaccurately attributing large numbers of attacks on villages and villagers in Darfur to the Government and Government forces, is highlighted by the fact that in the course of a number of "Janjaweed" attacks, "Janjaweed" raiders have attacked, killed and injured large numbers of Sudanese policemen, and attacked and destroyed police stations. The Commission itself accepted that this has happened and provided examples of such attacks. In paragraph 423, for example, the Commission reports that victims of attacks stated that the police were indeed targeted during the attacks on the villages and that they mainly blamed the Janjaweed for these actions. The Commission itself reports that there have been instances where Janjaweed gunmen have attacked and killed policemen defending villagers from Janjaweed attack. In paragraph 273, for example, the Commission notes that Janjaweed raiders killed 17 policemen in an attack on Kailek, in Southern Darfur.

72. Amnesty International has independently noted the fact that policemen have been targeted for attack by "Janjaweed" gangs.[23] Human Rights Watch researcher Julie Flint, for example, has reported on a "Janjaweed" attack on the police station at Terbeba. She does not mention what happened to the policemen inside, but states the police station was burned down.[24] "Janjaweed" gangs are also reported to have attacked Arab tribes.[25]

73. The simple fact is that "Janjaweed" gangs have killed and injured a large number of Sudanese policemen in their murderous attacks within Darfur. To insinuate that the Government is somehow a party to a conspiracy to kill its own policemen is an outrageous assertion.

Inaccurate findings with regard to rebel abuses of human rights

74. In paragraph 14, the Commission stated that it decided to examine existing reports on violations of international human rights and humanitarian law in Darfur, and to verify the veracity of those reports through its own findings, as well as to establish further facts. The Commission noted that in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body. It therefore collected all material necessary for such a legal analysis.

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[23] See, Julie Flint of Human Rights Watch, "Sudan's new killing fields", *Middle East International* (London), 27 May 2004. See also *Darfur: What Hope for the Future? Civilians in Urgent Need of Protection*, Amnesty International, London, 15 December 2004.

[24] Ibid.

[25] See, for example, "Tora Bora army strikes back at the Janjaweed", *Independent* (London), 16 August 2004. This article mentions Janjaweed attacks on the Arab Ma'aliyah tribe.

It is the Government of the Sudan's belief that the Commission was unable to fulfil the task it set itself.

75. In addition to pivotal flaws in the Commission's methodology with regard to the definition of the "Janjaweed" phenomenon, the Commission's findings and conclusions in a number of other areas were similarly inadequate. The Commission consistently understated both the scale and the nature of human rights abuses by the rebels. In paragraph 285, for example, the Commission stated that it found that rebels had killed civilians, although the incidents and number of deaths had been few. There was also no adequate reporting of rebel attacks on humanitarian aid workers and the delivery of humanitarian aid to Darfur's displaced communities. Given the crucial importance of humanitarian aid to the well-being of hundreds of thousands of war-affected people in Darfur, and the crucial role played by humanitarian aid workers, the Government of the Sudan was surprised at the Commission's inability to accurately reflect the magnitude of rebel attacks on aid and aid workers. The Government cites this issue as one more example of the Commission's inadequate approach to documenting human rights abuses in Darfur.

76. **Rebel attacks on humanitarian aid workers**. The Government of the Sudan was surprised at the superficial and factually inaccurate manner in which the Commission examined the obvious pattern of systematic rebel attacks on humanitarian delivery and humanitarian aid workers. The Commission, for example, made a number of surprising factual errors in its report. In the section entitled "Killing of humanitarian workers" (paras. 289-290), the Commission incorrectly attributes the murder in a landmine explosion of two aid workers (incorrectly said to be international — one was foreign, the other Sudanese) to the new rebel group, the National Movement for Reform and Development. The Sudan Liberation Army carried out the attack in question.

77. Similarly, the Commission states that "in another incident involving the same international humanitarian organization, two of its staff members working with a mobile health clinic were brutally killed while travelling in a clearly marked humanitarian convoy ... The circumstances of the killings remain unclear". The African Union and the United Nations have clearly identified the Sudan Liberation Army in this outrage.

78. Both of these incidents have been well investigated and the facts established beyond reasonable doubt. It is difficult to explain the Commission's inability to establish these simple details especially given the fact that while the murders are in and of themselves the most serious of human rights abuses, it is widely realized that the murder of aid workers in Darfur has particularly serious implications for the continued delivery of critical live-saving humanitarian assistance in the region.

79. Given that in the above instances the Commission was apparently unable to establish facts despite the above-mentioned murders having been very well documented, and that the sequence of events and responsibility had been clearly established, this reflects poorly on the Commission's ability to establish facts in considerably more difficult and controversial circumstances.

80. Rebel attacks on humanitarian aid workers provide a black and white example of inadequate reporting by the Commission, to the extent of failing to address its mandate of investigating reports of violations of international humanitarian law and human rights by all parties. The systematic obstruction of humanitarian aid delivery,

attacks on aid convoys and the intimidation, abduction and killing of aid workers has been well documented in considerable detail, not least by the United Nations itself.

81. What the Commission also omitted to record was a clear and systematic pattern of rebel attacks on humanitarian aid workers and humanitarian aid convoys. The Secretary-General himself noted that these attacks had escalated in the course of 2004. In his report of January 2005, pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of resolution 1564 (2004) and paragraph 17 of resolution 1574 (2004), he recorded a "new trend" in the pattern of attacks on, and harassment of, international aid workers: "While previous incidents have only been aimed at looting supplies and goods, December has seen acts of murder and vicious assaults on staff, forcing some agencies to leave Darfur."[26] As the Commission would have been aware from its access to United Nations documentation and reports, and even from numerous international media accounts, those murders and assaults were carried out by the rebel movements.

82. The Commission appears to have ignored international media reporting of this pattern of activity. Early in June 2004, Associated Press reported the abduction by rebels of 16 aid workers. Those kidnapped worked for the International Rescue Committee, Save the Children UK, the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat, the World Food Programme, UNICEF, the Norwegian Refugee Council, ECHO (the Humanitarian Aid Office of the European Commission) and the Humanitarian Aid Commission of the Sudan. They were abducted while conducting assessments to prepare the way for delivery of relief assistance for displaced people in the vicinity of Al Hilief in Northern Darfur, despite the fact that they were driving vehicles clearly bearing the United Nations insignia.[27] The Emergency Relief Coordinator, Jan Egeland, condemned the detention and delayed release of the 16 aid workers as "totally unacceptable" and contradicting "solemn promises" made by SLA, and said: "Too much time has already been lost in this race against the clock to save more than a million lives threatened by indiscriminate violence, starvation and disease." The United Nations stated that the incident not only threatened the safety and security of humanitarian workers, but had interrupted and delayed aid to desperately needy civilians in Darfur.[28]

83. On 8 June 2004, Agence France Presse reported that rebels had seized nine trucks loaded with relief items, medicines and tents on the road between Nyala and Al-Fasher. The rebels abducted four of the drivers.[29] Later that month, rebels attacked a humanitarian relief convoy in Darfur, stealing 57 tons of United Nations food aid. In the first week of July, SLA attacked 26 aid workers, working for Save the Children UK, delivering emergency assistance in Northern Darfur. They also stole six vehicles and a large amount of cash. There were a number of systematic

[26] S/2005/10 and Corr.1 (7 January 2005), para. 15 (g).

[27] "Rebel group abducts 16 relief workers in Sudan's Darfur region", Associated Press, 5 June 2004.

[28] "Top UN relief official welcomes release of aid workers, calls their detention 'totally unacceptable'", press statement, Office for the Coordination of Humanitarian Affairs, Geneva, 6 June 2004.

[29] "Rebels commandeer relief trucks in Sudan's Darfur region", Agence France Presse, 8 June 2004.

rebel attacks on aid workers in August 2004. The African Union confirmed, for example, that, on 22 August, SLA forces had abducted humanitarian affairs workers on their way to a meeting in the Abgaragil area, and that on 23 August rebels had abducted medical aid workers engaged in an inoculation campaign in Kutum.[30] At the end of August 2004, rebels abducted six aid workers in Northern Darfur. Three were from the World Food Programme and three from the Sudanese Red Crescent. WFP condemned the targeting of humanitarian workers. WFP Senior Deputy Executive Director Jean-Jacques Graisse noted: "This is not ... the first time that humanitarian workers have been targeted in Darfur. At a time when all agencies are battling the rainy season, poor infrastructure and an unpredictable security environment to deliver desperately needed humanitarian assistance, this kind of incident can only further worsen the plight of the needy in Darfur. We call upon all armed groups in the region to stop targeting those involved in humanitarian work and allow them to do their duty without fear of intimidation. Any continuation or escalation of incidents such as the one just resolved is likely to have far-reaching consequences for the relief operation."[31] On 31 August 2004, JEM gunmen detained 22 Sudanese health workers near Nyala in Southern Darfur.[32]

84. In October 2004 a SLA landmine killed two Save the Children Fund workers. The United Nations Special Envoy to the Sudan, Jan Pronk, unambiguously confirmed rebel involvement in those deaths: "It was the rebels who are responsible for attacking relief workers and convoys, they are responsible for ... landmines which killed two relief workers."[33] That same month, it was reported that United Nations spokesman Fred Eckhard said in New York that the operations of humanitarian agencies in Northern Darfur State had become limited because some roads remained closed to them. "Other areas have become dangerous for transporting aid supplies ... forces from the rebel Sudan Liberation Army hijacked seven commercial trucks on a road about 120 kilometres east of the state capital El-Fasher."[34]

85. In mid-November 2004, the United Nations said that nearly 200,000 needy people, especially in the mountainous Jebel Marra area in central Darfur and the northern part of Northern Darfur, had been cut off from relief aid because of escalating rebel violence. The German press agency reported the United Nations as stating that tension in the region had risen as rebel groups, in particular the Sudan Liberation Army, had increased their operations in an apparent attempt to claim more territory. The Humanitarian Coordinator for the Sudan, Manuel Aranda da Silva, said an estimated 150,000 people were driven from their homes owing to the escalating violence in November. The United Nations also reported several attacks on buses and aid convoys around Darfur.[35] By the end of November, the *New York*

[30] *Report of the Ceasefire Commission on the Situation in Darfur*, African Union, Addis Ababa, 4 October 2004.

[31] "Abducted WFP staff released by rebels in Darfur", press release, World Food Programme, Rome, 1 September 2004.

[32] Ibid.

[33] "UN envoy blames Darfur rebels for deaths of aid officials", Agence France Presse, 27 October 2004.

[34] "Humanitarian aid in Sudan limited by insecurity, road closures, says UN mission", United Nations News Service (New York), 27 October 2004.

[35] "U.N. says 200,000 denied aid as a result of Darfur violence", Deutsche Press Agentur, 14 November 2004.

Times was reporting that the rebels had been "sharply ratcheting up attacks", which in turn was preventing relief work.[36]

86. In November 2004 the rebels were accused of attacking a joint WHO/Ministry of Health medical team. One doctor was killed and four other health workers were injured. The team was also robbed.[37] In the same month both the Dublin-based GOAL aid agency and the Spanish branch of Médecins sans Frontières were forced to withdraw their staff from the Jebel Marra area in central Darfur after "repeated" rebel acts of aggression targeting the humanitarian personnel and the relief supplies intended for people in need.[38] Both MSF and GOAL complained that rebels had attacked their vehicles.[39] On 27 November 2004, the *New York Times* revealed the degree of rebel obstruction of aid delivery and aid workers: "On the ground, many aid workers, too fearful of giving their names for fear of jeopardizing their work, say that rebel officials have made unreasonable demands on aid groups operating in their territory, at one point insisting on a certain number of expatriates to accompany Sudanese staff, whom rebels distrust as potential government spies. Aid workers have also been detained in rebel territory in recent months."[40] Amnesty International noted a similar pattern of rebel activity: "over the past two months, a number of World Food Programme commercial trucks have been attacked in South Darfur."[41]

87. Early in December, the *Christian Science Monitor* confirmed the results of rebel action: "Recently they've stepped up attacks and have even looted international aid convoys. The violence adds to the instability — and to aid groups' growing inability to help the displaced millions."[42] Two Save the Children aid workers, members of a mobile medical clinic, were murdered by rebels on 12 December 2004. The African Union and United Nations confirmed the responsibility of SLA for the deaths of the aid workers. In addition to the murdered aid workers, one other worker was injured and three are missing. An African Union officer, Nigerian Major General Festus Okonkwo, stated: "SLA was involved in the attack as two Land Rovers belonging to Save the Children UK were recovered from the SLA camp in Jurof."[43] Rebel involvement in the murders was established by the United Nations.[44] In mid-December the United Nations suspended aid operations in Southern Darfur in December in the wake of the murders.[45]

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[36] "Despite pact, new violence stymies aid in Sudan", *New York Times*, 28 November 2004.

[37] "Doctor killed, four injured in Sudan's Darfur", *Al-Rai Al-Amm* (Khartoum), 8 November 2004.

[38] See, for example, "Foreign aid groups flee rebel attacks in Sudan's Darfur: report", Agence France Presse, 7 November 2004.

[39] "MSF Spain flees rebel attacks in Sudan's Darfur", Agence France Presse, 7 November 2004.

[40] "Fresh violence engulfs Darfur", *New York Times*, 27 November 2004.

[41] "Armed groups must stop targeting civilians and humanitarian convoys", press release, Amnesty International, 3 November 2004.

[42] "Moral clarity blurs in Darfur crisis", *Christian Science Monitor* (Boston), 10 December 2004. See also, "Crisis in Sudan's Darfur deepens as new violence prevents food deliveries", Knight Ridder Newspapers, 23 November 2004 and "16 killed in Darfur, humanitarian aid road closed: UN spokesman", Agence France Presse, 17 November 2004.

[43] "Arms pouring into Darfur, officials say: African Union calls region a 'time bomb'", Reuters, 17 December 2004.

[44] "UN points at rebels for Darfur aid workers' death", Reuters, 15 December 2004.

[45] "UN suspends aid operations in South Darfur after killings: two workers fatally shot in convoy attack", Associated Press, 14 December 2004.

88. The Special Envoy to the Sudan, Jan Pronk, said of the rebel attacks and interference with aid deliveries: "They have to stop. Otherwise they are blocking access to the very people they say they are protecting."[46] In the United Nations *Darfur Humanitarian Profile* released in December 2004 it was stated, for example: "Despite prevailing insecurity in the three Darfur States, 79% of Darfur conflict-affected population is currently accessible to United Nations humanitarian workers. Most of the underserved areas remain rebel-held, many of which have not been accessible to United Nations agencies because of a series of security incidents and a delay in obtaining SLA agreement and understanding of humanitarian rules and principles laid out in agreements."[47]

89. On 15 December 2004, the United Nations reported further rebel attacks on food aid convoys: "WFP reports that food distribution has been seriously disrupted by ongoing insecurity. On 18 December 2004, SLA detained a total of 13 trucks. Five of them were released on the same day but the rest were kept until 21 December ... the disruption affected food distribution in Marla and Sania Fundu. Food assistance has also been halted in Labado, Al Juruf, Muhujarija, Khor Abechi, Manawashi, Mershing, Rokero and Gildo Labado."[48] On 22 December 2004, the *New York Times* also reported: "The chaotic situation in Darfur has hampered the work of agencies trying to reach the estimated 2.3 million people who rely on aid to survive. Aid organizations in the region say rebels have been attacking convoys carrying aid and goods along the road between Nyala and El Fasher, where two Save the Children UK workers were killed recently."[49] Ongoing rebel attacks, particularly that on the market town of Ghubaysh on 27 December, had disastrous effects on the delivery of food aid to affected communities. The United Nations noted:

> The World Food Programme has suspended food convoys to the Darfur States following a large-scale attack yesterday by rebel forces on the market town of Ghubaysh ... WFP has halted three convoys of 70 trucks carrying more than 1,300 MT of WFP food aid destined for El Fasher and Nyala ... this recent insecurity has cut off assistance to some 260,000 people who will miss their December rations in Southern Darfur as well as eastern parts of Western Darfur ... Notably, it is the second attack by SLA since 19 December when the Government of the Sudan agreed to an immediate cessation of hostilities. This latest insecurity has serious consequences for the United Nations and NGO operations in Darfur, as it effectively blocks overland access from central Sudan to the Darfur region. This has a particular impact on WFP provision of life saving food aid, as it must rely heavily on road deliveries to support its Darfur humanitarian operation. The United Nations is also concerned about reports that Darfur-based rebel movement forces have stolen in the last two weeks 13 commercial all-terrain trucks leased to WFP, loaded with urgently required WFP food commodities for the affected people of Darfur and dedicated to the transportation of food aid to Darfur ... The latest thefts are in addition to multiple losses of commercial and aid agency vehicles to armed

[46] "Rebel attacks raise insecurity, cut Darfur refugees off from aid", *Washington Post*, 21 November 2004.

[47] Press briefing, Office of the Spokesman, United Nations Advance Mission in the Sudan, 15 December 2004.

[48] United Nations Darfur situation report, Khartoum, 21 December 2004.

[49] "Sudan and rebels suspend peace talks, as aid group withdraws", *New York Times*, 22 December 2004.

groups in recent months. More alarming are reports that the rebel groups that stole them may now be using some of these trucks for military purposes."[50]

90. A World Food Programme spokeswoman said of these incidents: "The attacks followed a week of insecurity in Darfur and this has caused difficulties, in terms of providing assistance. It will delay urgently required food for 260,000 people in Southern Darfur and the eastern parts of Western Darfur."[51]

91. The international community has roundly condemned these rebel actions.[52] The systematic rebel attacks have placed hundreds of thousands of war-affected civilians in danger of starvation. In December 2004, the director of Save the Children UK stated that his organization was unable to continue to offer health care, nutritional support, child protection and education to the approximately 250,000 children and family members they had been serving. He said that Save the Children was unable to expose its staff to the unacceptable risks they faced in Darfur. The previous month, Amnesty International had also noted the effect of rebel attacks: "Insecurity within Darfur hinders movement to whole districts, so that food, medicine and other non-food items cannot be brought in. This increases enormously the sufferings of an already vulnerable population." Amnesty International noted that "After such attacks, the district or road is likely to be declared a no-go area for international humanitarian staff for several days" and pointed out that it stopped aid reaching "thousands" of displaced people. Amnesty International made a point noticeably absent from the Commission's report: "Attacks knowingly and intentionally directed against personnel involved in humanitarian assistance in armed conflict may constitute war crimes."[53]

92. On 31 December 2004, the international media reported that SLA attacks in December had "forced the United Nations to suspend supply convoys into Darfur". The *Daily Telegraph* further noted: "The SLA attacks seemed to be designed to isolate Darfur. The rebels struck police stations in the town of Ghibaish and al-Majsour in the neighbouring province of West Kordofan, killing 99 people. The ensuing battle closed Darfur's main communication artery."[54]

93. This aforementioned publicly documented catalogue of systematic and sustained rebel attacks on humanitarian aid workers and the delivery of humanitarian aid in Darfur, itself amounting to a very small sample of rebel attacks of this sort, went without comment in the Commission's report. This is particularly surprising given the Commission's access to detailed United Nations records of such attacks as well as its access to international media reporting on the issue.

94. The Government of the Sudan notes that at paragraph 561 the Commission clearly states: "With regard to the position of rebels, it would be groundless to argue ... that the two groups of insurgents (SLA and JEM) were not tightly organized militarily, with

[50] "Fighting in Ghubaysh hinders humanitarian assistance", press release, Office of the Special Representative of the Secretary-General for the Sudan, Khartoum, 28 December 2004.

[51] "Clashes force WFP to suspend food convoys to Darfur", Integrated Regional Information Networks, Office for the Coordination of Humanitarian Affairs, 29 December 2004.

[52] See, for example, "U.N. envoy, Britain blame rebels for renewed fighting in Darfur; World Food Programme pulls out", 25 November 2004; "World should hold Darfur rebels accountable — United Nations Pronk", Reuters, 25 November 2004.

[53] "Armed groups must stop targeting civilians and humanitarian convoys", press release, Amnesty International, 3 November 2004.

[54] "Rebel raids block UN aid to Darfur", *Daily Telegraph* (London), 31 December 2004.

the consequence that often military engagements conducted in the field had not been planned, directed or approved by the military leadership." The Commission failed to apply this finding of fact to the systematic pattern of killings, abductions and attacks aimed at humanitarian aid workers carried out by the rebels.

95. **Rebel attacks on the civilian population of Darfur**. In its concluding observations with regard to rebel attacks on civilians in paragraph 268, the Commission states: "In general, the Commission has found no evidence that attacks by rebels on civilians have been widespread, or that rebel attacks have systematically targeted the civilian population." Elsewhere, at paragraph 285, the Commission states: "The Commission ... has found that rebels have killed civilians, although the incidents and number of deaths have been few." These are seriously flawed and inaccurate conclusions, which demonstrate an inadequate study and analysis of human rights abuses in Darfur.

96. The evidence that there have been widespread rebel attacks on civilians is clear. The Government of the Sudan presented volumes of evidence documenting such attacks — evidence which was not reflected in the Commission's report. Leaving this Government evidence to one side, international human rights organizations and independent media coverage, even in their very limited coverage of rebel abuses, have amply demonstrated such a pattern of attacks.

97. While asserting that rebel attacks on towns have not resulted in civilian casualties, the Commission ignored clear reports that rebel attacks on Al-Fasher in April 2003, and elsewhere, had resulted in large-scale civilian casualties. Human Rights Watch has reported that rebel attacks on towns early in 2003 resulted in considerable loss of civilian life. Human Rights Watch researchers have stated, in June 2004, for example, that "heavy civilian casualties" were caused during those attacks. A Human Rights Watch researcher stated that the April 2003 attack on Al-Fasher "resulted in the deaths of numerous civilians".[55] The Government is surprised that those attacks within urban areas easily accessible to the Commission and its staff were not investigated.

98. In its report of November 2004, Human Rights Watch provided the outside world with a snapshot of rebel human rights abuses in one particular area, Malam located on the eastern side of the Jebel Marra, approximately 100 kilometres north of Nyala, in Southern Darfur. Human Rights Watch has cited numerous examples of the murder of civilians, the rape of women and abduction of young children by Sudan Liberation Army rebels in and around this location, an area inhabited both by Fur and people from the Beni Mansour tribe. SLA rebels have been attacking civilians in this area — one of many in Darfur — since they began the war. Human Rights Watch, for example, noted a list of 60 Beni Mansour women and girls who were said to have been raped or assaulted by rebels in attacks between 10 February and 7 July 2004.[56] In one attack in the area, on 21 April 2004, the rebels killed 10 civilians. Six more civilians were murdered in an attack in nearby Um Dashur early in June 2004. Human Rights Watch also reported that in mid-June 2004 rebel gunmen were said to have raped several Beni Mansour women near Malam. Rebels

[55] See, for example, "Sudan: peace, but at what price? Testimony by Julie Flint before U.S. Senate Foreign Relations Committee", Human Rights Watch, New York, 2004, available at http://hrw.org/english/docs.

[56] *"If We Return, We Will Be Killed": Consolidation of Ethnic Cleansing in Darfur, Sudan*, Human Rights Watch, New York, 2004, p. 74.

attacked Malam again in October 2004, killing three civilians, including a 12-year-old girl, and injuring several more. Human Rights Watch also reported that it had received a list of 39 people, including two children, said to have been abducted in the Malam area from 2 August 2003 to 10 July 2004, adding that their whereabouts remained unknown. In January 2005, the United Nations reported that between 24 and 36 civilians had died and 26 others had been wounded in fresh rebel attacks on villages in and around Malam.[57] Rebel human rights abuses in and around Malam provide the international community with documented examples of rebel abuses in one small specific area of Darfur. This is a pattern of abuses that has been repeated throughout Darfur. Even these attacks were not recorded in the Commission's report.

99. The *Economist* has provided observers with another snapshot of rebel abuses. It reported that rebels burned down 12 villages in the area of Ishbara, located some 120 miles north of Al-Geneina, in Western Darfur. They had "killed anyone who crossed their path." Those civilians who survived now live in the Wadi Bardi refugee camp. Another five villages were said to have been abandoned by villagers. The *Daily Telegraph*, reporting on the same attacks, pointed out that rebel "brutality at least equals" that of the Janjaweed, and that the rebels "have received none of the international condemnation heaped upon the Janjaweed".[58] The London *Independent* has also reported on claims that the rebels were "driving Arabs from their villages."[59] The *Independent* has reported on the 10,000 Arab villagers living in the Mosset refugee camp, near Nyala in Southern Darfur, and on their claims to have "been attacked, driven from their homes, and abandoned to face pending epidemics of cholera, malaria and hepatitis. They say their persecutors are African tribes in league with the Sudan Liberation Army, with their own campaigns of driving out another community."[60]

100. The Commission in paragraph 255 has itself documented rebel attacks on Kulbus in Western Darfur. It states that 17 civilians were killed and 50 injured in an attack on 4 October 2003. In another attack on 25 and 26 December 2003, it states that four civilians were killed. In paragraph 287, the Commission records a rebel attack on "members of the nomadic Rizeigat tribe" in the Kulbus area, in which the attackers "killed 48 persons including women and children and stole property and livestock from the market and then destroyed it". In paragraph 257, the Commission also records three separate rebel attacks in Baram, Southern Darfur, in March 2004. Those attacks reflect a very small percentage of rebel attacks on civilians and civilian property since early 2003.

101. In reviewing the above examples of rebel human rights abuses cited by the Commission, the Government of the Sudan finds that this is a wholly inadequate examination of the pattern and nature of rebel attacks on civilians in Darfur. It is worth noting that even in their minimalist references to rebel human rights abuses in Darfur, Human Rights Watch and the *Economist* provide a more detailed picture than the Commission.

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[57] "Sudan: many reported killed during new hostilities in Darfur", Integrated Regional Information Networks, Office for the Coordination of Humanitarian Affairs, 27 January 2005.

[58] "The other rebels causing carnage in Sudan", *Daily Telegraph* (London), 13 August 2004.

[59] "Tora Bora army strikes back at the Janjaweed", *Independent* (London), 16 August 2004.

[60] "We are victims too, say Darfur's Arab refugees", *Independent* (London), 13 August 2004.

102. The Commission also did not accurately reflect the scale or nature of sexual violence perpetrated by the rebels. In paragraph 335, the Commission states, with regard to allegations of rape by rebels: "There were few cases reported of rebels committing rape and sexual violence." Given the sensitivity of this issue, and given the attention devoted by the Commission to the issue of rape in general, the Government of the Sudan is very surprised at such a statement. Human Rights Watch, for example, has reported that it had received a list of 60 Beni Mansour women and girls who were said to have been raped or assaulted by rebels in attacks from 10 February to 7 July 2004. Human Rights Watch also reported that in mid-June 2004 rebel gunmen were said to have raped several Beni Mansour women near Malam.[61] These were rapes reported in one area alone. The Government believes them to be representative of a pattern of sexual violence by rebels across Darfur. The Commission was also provided with detailed information regarding a number of incidents of rape carried out by rebels. None of the cases presented to the Commission was investigated or in any way adequately addressed in its report.

103. **Rebel use of child soldiers.** The Commission's investigation into the rebels' systematic use of child soldiers, and its conclusions on this issue, were particularly flawed. That the rebel movements have systematically used child soldiers is irrefutable. The *Independent* newspaper has reported the presence of hundreds of child soldiers, some as young as 10, with the rebels.[62] Human Rights Watch has clearly documented that both movements use child soldiers. Human Rights Watch researchers in Northern Darfur in July and August 2004 observed and photographed SLA child soldiers, some as young as 12.[63] The African Union has also confirmed that the Sudan Liberation Army is arming and using child soldiers.[64]

104. In paragraph 414, for example, the Commission notes that there have been some reports of the use of child soldiers by the two rebel groups JEM and SLA. The Commission stated that those reports contained no details regarding, for instance, the manner of their recruitment or the area of their deployment. This is untrue. The Commission ignored a considerable body of evidence presented to it by the Government of the Sudan and others. It has also ignored independent accounts by the international media.

105. It was very surprising to note, in paragraph 415, that, with regard to rebel use of child soldiers, the Commission commented — seemingly almost in mitigation, "There is ... no indication these have been forced recruitments." This is irrelevant and incorrect. As Human Rights Watch has correctly pointed out, "it is unlawful ... to deploy children as combatants, whether or not they were forcibly recruited or joined on their own accord."[65] That there has been forced recruitment of children has also been independently established. An experienced American journalist has

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[61] *"If We Return, We Will Be Killed": Consolidation of Ethnic Cleansing in Darfur, Sudan*, Human Rights Watch, New York, 2004, n.74.

[62] "Sudanese rebels claim new talks are last hope for peace", *Independent* (London), 15 September 2004. See also "Sudan Government's attacks stoke rebels' fury", *New York Times*, 11 September 2004, which also confirmed that rebel ranks are "filled" with child soldiers, some no more than 13.

[63] *"If We Return, We Will Be Killed": Consolidation of Ethnic Cleansing in Darfur, Sudan*, Human Rights Watch, New York, 2004.

[64] *Report of the Ceasefire Commission on the Situation in Darfur*, African Union, Addis Ababa, 4 October 2004. See also "Sudan's ragtag rebels", *Washington Post*, 7 September 2004.

[65] *"If We Return, We Will Be Killed": Consolidation of Ethnic Cleansing in Darfur, Sudan*, Human Rights Watch, New York, 2004.

investigated the rebel use of child soldiers. That investigation documented relevant details regarding a child eyewitness, Mubarak. He had been abducted from Kudum, in Southern Darfur, by SLA. The report stated that, following an attack on his school, rebels had abducted "several dozen frightened boys ... and marched them off into the countryside. The heavily armed men asked the boys if any of them wanted to go. Eight of them raised their hands and ... the rebels told them they could run away. Mubarak said he still remembered the loud bangs when the men shot two of the escaping boys. The remaining boys became rebels. 'I had to join them', Mubarak said. 'I was afraid I would be killed, too.'"[66]

106. The rebel movements are obviously aware that it is illegal to use child soldiers. Journalists reported seeing fighters who "seem to be no more than schoolboys" who, when asked their age, reply with "the stock answer": "I have just become 18, sir. I am not a child soldier."[67] The presence of hundreds — if not more — of child soldiers within the rebel movements, and a clear intent to deceive outside observers, is in itself proof of premeditated and systematic recruitment and use of child soldiers, a serious war crime. The gravity of this practice was not borne out in any way by the reporting by, and conclusions of, the Commission on this issue.

The Commission's recommendation for referral of cases to the International Criminal Court

107. It is clear that the Commission set out from the start of its investigation with a predetermined desire to refer its findings to the International Criminal Court. This considerably undermined the Commission's objectivity and impartiality. In so doing the Commission ignored fundamental facts with regard to complementarily and admissibility. It was also acting outside of its mandate in drawing such a conclusion.

108. The Commission, for example, has recommended referral of a number of cases concerning Darfur to the International Criminal Court. This is said to be based on two assumptions. First, that Sudanese courts are unwilling or unable to prosecute suspects and secondly, that such a referral would ensure a neutral atmosphere for such trials.

109. The Government of the Sudan finds the Commission's assertion that Sudanese courts are unwilling or unable to prosecute alleged perpetrators of human rights abuse in Darfur unacceptable and unjustified. The principle of complementarity means that the International Criminal Court is not intended as a substitute for national jurisdiction. It is to complement, not replace national systems of justice. The related principle of "unwillingness" means that the State in question simply refuses, for whatever reasons, to bring perpetrators of human rights violations to justice. "Inability" to do so means that, although the State may be willing to prosecute perpetrators, it may not be able to do so for one or more of several reasons.

110. The willingness of the Government of the Sudan to investigate and prosecute perpetrators of human rights abuse in Darfur has been demonstrated by, inter alia:

(a) The full cooperation of the Government with the International Commission and the facilitation of all of its work in Darfur and other parts of the

[66] "Violence in Sudan is bringing a quick end to many childhoods", *International Herald Tribune*, 16 August 2004.

[67] "Sudanese rebel fighters braced for attack", *Independent* (London), 14 August 2004.

Sudan. This has included freedom of movement for the Commission and its staff throughout Darfur and other parts of the Sudan; meetings with representatives of Government at all levels, visiting Darfur and meeting with all necessary persons and witnesses; interviewing victims, witnesses and other persons; meetings with national and international non-governmental organizations, diplomats and United Nations personnel. As much was acknowledged by the Commission in its report (paras. 30-32);

(b) Confirmation by the First Vice-President, the Minister of Justice and other senior officials of the Government of the Sudan that it would welcome the report of the Commission and seek to implement relevant and justifiable recommendations, including criminal prosecution for perpetrators of human rights abuse;

(c) The establishment of a 10-member National Commission of Inquiry into human rights abuses in Darfur on 8 May 2004. This National Commission was chaired by a former chief justice of the Sudan, and made up of retired senior civil servants, prominent human rights activists, parliamentarians and administrators. It was mandated to collect information about alleged violations of human rights carried out by armed groups in Darfur and to determine responsibility for those violations it established had occurred. The National Commission reported back to the President of the Sudan in January 2005, and the Commission received a copy of its findings on 16 January 2005.

111. The Government was surprised at the International Commission's criticism of the work and findings of the National Commission. Both commissions, for example, came to a number of similar conclusions, inter alia, that genocide had not occurred in Darfur, that there had, nevertheless, been serious violations of human rights and international humanitarian law, that there was a need for a separate court to deal with alleged human rights abuses and that there was a need for a compensation court. Both commissions also established a list of individuals they believed had been responsible for alleged human rights abuses.

112. The National Commission went even further than the International Commission in that it also recommended the establishment of a judicial commission to examine the issue of tribal boundaries within Darfur, an issue seen to be at the heart of much of the conflict.

113. It should also be noted that the National Commission spent considerably more time in the course of its investigations in Darfur itself, interviewed many more people and was able to examine all the issues in much more depth than the International Commission.

114. After the Government had received the report and recommendations of the National Commission, it established several high-level judicial commissions to investigate the allegations of human rights abuses made by the National Commission with a view to prosecuting any possible perpetrators of human rights abuses, and to address the issue of compensation for victims of such crimes.

115. The Government of the Sudan remains committed to bringing to justice perpetrators of human rights abuses.

116. **The Sudanese legal system**. In part four of its report (paras. 565-570), the Commission makes several criticisms of the Sudan's legal system, in particular in

relation to the independence of the judiciary. This is used in part to justify the recommendation to the Security Council to refer the Darfur report to the International Criminal Court. The Government rejects this criticism as unfounded and derogatory.

117. The Sudan has a functioning and competent legal system. Sudanese judges are appointed according to strict criteria, including, for example, the possession of a law degree and passing the Bar examination. Appointment as a high court judge would need at least 20 years of experience within the legal profession. There are 1,619 courts throughout the Sudan, 898 of which are magistrate courts. In the greater Darfur region there are 115 courts of law. The above-mentioned courts are served by 3,700 judges.

118. While there is no doubt that law and order and the judicial system in Darfur itself have been badly affected by the conflict (through the murder of hundreds of policemen, the destruction of police stations, and attacks on courts and members of the judiciary), it has continued to function. The Sudanese judiciary in Darfur heard 30,840 cases in 2003, of which 15,598 were criminal cases. In 2004, the same legal system dealt with 27,317 cases, of which 11,642 were criminal cases.

119. In paragraph 605 onwards, the Commission adopts an unacceptable and unprecedented position in suggesting that States other than the Sudan could assume universal jurisdiction of crimes allegedly committed in Darfur. In effect, the Commission suggests that the courts of the whole world, with the exception of Sudanese courts, could assume jurisdiction over alleged events in Darfur. This is clearly an unjustified and unwarranted violation of national sovereignty.

120. It should also be noted that any referral to the International Criminal Court undermines the Comprehensive Peace Agreement signed on 9 January 2005 by the Government of the Sudan and the Sudan People's Liberation Army/Movement, ending the civil war in southern Sudan. The power-sharing protocol guarantees the independence of the judiciary in the Interim National Constitution which will be adopted within six weeks.

121. The Commission, in making its recommendations, also undermines the important role which has been played and continues to be played by the African Union in resolving the Darfur conflict and addressing the human rights violations. The role of the African Union is in keeping with and has been recognized by the following: Article 52 of the Charter of the United Nations; paragraph 3 of Security Council resolution 1564 (2004) and the Protocol on the Improvement of the Humanitarian Situation in Darfur, signed on 9 November 2004, and concluded under the auspices of the African Union.

122. The Government has arrested, charged and prosecuted many violators of human rights in Darfur. Many others are in detention or under investigation pending trial. This has included those accused of "Janjaweed"-type crimes as well as members of the armed forces. Up to December 2003, for example, 27 members of the Sudan's regular and semi-regular forces (involving 12 army, 13 Popular Defence Force and 2 police personnel) had been charged and prosecuted in the Al-Gencina criminal court in Western Darfur. Twenty-two were convicted. In Northern Darfur, 13 members of the armed forces (involving 6 army, 2 Border Guard and 5 police personnel) were charged with offences. Ten of the 13 were convicted. There are many ongoing cases.

Conclusions

123. The Government of the Sudan has grave reservations as to the methodology used by the Commission in preparing its report and reaching its conclusions. It is clear that the Commission did not have an adequate number of staff for the task it undertook. This is reflected, outside of its review of the central issue of whether genocide has occurred in Darfur, in an essentially superficial and undemanding investigation into human rights abuses in Darfur which has taken — from an international point of view — the path of least resistance.

124. The Commission has set unacceptable obstacles in accepting evidence and documentation. While establishing for itself an unacceptably low standard of evidence, as outlined and discussed above, the Commission had insisted that the Government produce "concrete information or evidence" (para. 414) to support its case. It is evident that it is a standard of evidence which it has not sought to apply to itself: see, as but one example, its alleged case study of an "indiscriminate" government attack on civilians or civilian objects (para. 253), in which it asserts that between 20 and 30 civilians were killed. This hardly qualifies as "concrete information or evidence". This is patently against natural justice and has irretrievably damaged the methodology and most of the conclusions of the report.

125. The Government of the Sudan notes that the Commission on several occasions confirms that, even with the low evidential threshold set by itself, there is little evidence directly linking Government forces with many of the human rights abuses in Darfur. For example, the Commission finds that "the Government may not have participated" in most of the incidents [involving large-scale destruction of villages in Darfur] (para. 632). Similarly, for example, with regard to allegations of looting, "there are no incidents of looting clearly reported to have been committed by Government forces alone" (para. 380).

126. The remarkably superficial working definition of "Janjaweed" fundamentally undermined the work of the Commission and its report. In ignoring clearly pre-existing patterns of criminality, either large-scale opportunistic criminal attacks on and looting of villages or ad hoc spontaneous inter-tribal attacks motivated either by pre-existing feuds or as revenge attacks for perceived grievances including the killing of members of certain tribes or theft of livestock from those tribes, the report built an irretrievable flaw into its findings.

127. Despite clear evidence of the existence of a range of armed groups outside of Government control (groups that are both African and Arab, as well as many opportunist criminal groups from Darfur and Chad, groups often operating in large numbers, and groups that have engaged in numerous attacks on civilians and villages), in paragraph 315, the Commission nonetheless holds the Government of the Sudan responsible for all these activities. In paragraph 126, the Commission states, "even in instances where the Janjaweed may have acted without evidence of Government support, Government officials may incur criminal responsibility". That this is a perverse finding is self-evident. Using the same low level of evidentiary standards, it is reasonable to believe that there have been a number of armed groups operating well beyond Government control that have been responsible for opportunistic and often large-scale attacks on villages and villagers in Darfur, attacks motivated by a variety of reasons.

128. For these reasons and others relating to the accuracy of many of the Commission's findings, the Government of the Sudan strongly objects to the Commission's recommendation that the Darfur issue be referred to the International Criminal Court. The judicial system of the Sudan is a competent authority to bring perpetrators of human rights abuse and violations of international humanitarian law to justice.

129. The Government of the Sudan welcomes the idea of establishing a body for compensation of victims of violence in Darfur. The Government of the Sudan has already been engaged in putting such a mechanism in place. Compensation of such victims will be implemented in accordance with relevant Sudanese legislation and prevailing traditions and customs within Darfur with full transparency.